No. 85-1589

In the Supreme Court of the United States

OCTOBER TERM, 1986

IOWA MUTUAL INSURANCE COMPANY, PETITIONER

v.

EDWARD M. LAPLANTE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether, in an action brought by a citizen of one state against tribal Indians resident on a reservation in another state, where the events giving rise to the cause of action centered on the reservation and are the subject of a claim pending before the tribal court, the federal district court should refrain from exercising diversity jurisdiction unless the tribal court proceedings have been completed and the tribal court had no jurisdiction.

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INTEREST OF THE UNITED STATES

The United States has long been committed to fostering meaningful self-government and self-determination for Indian Tribes. See, *e.g.*, *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 143-144 & n.10 (1980). That objective requires proper deference to the role of tribal institutions, including tribal courts. It is thus directly implicated in this case, which concerns the appropriateness of federal court adjudication of a dispute, already the subject of a

suit in tribal court, in which the welfare of tribal members is significantly implicated.

STATEMENT

Iowa Mutual Insurance Company, an Iowa corporation, issued liability insurance policies to the Wellman Ranch, located within the Blackfeet Indian Reservation in Montana. The ranch was owned and operated by the Wellmans, enrolled members of the Blackfeet Indian Tribe. The Wellmans purchased the insurance policies at the office of an independent insurance agent located in Montana but off the reservation (Pet. 2-3).

1. On May 3, 1982, Edward LaPlante, an employee of the Wellman Ranch, was injured in a single vehicle accident on U.S. Highway 89 within the reservation. Alleging that he was acting within the course and scope of his employment at the time of the accident, LaPlante, joined by his wife, Verla La Plante, brought suit against the Wellmans in Blackfeet Tribal Court. They sought compensatory damages for personal injury and loss of consortium. The LaPlantes also named as defendants Iowa Mutual Insurance Company and Midland Claims Service, the insurance adjustor employed by Iowa Mutual. Against these defendants, the LaPlantes sought compensatory and punitive damages for the companies' alleged bad faith refusal to settle the LaPlantes' claims. The LaPlantes are both enrolled members of the Blackfeet Indian Tribe (J.A. 5-9).

Iowa Mutual and Midland Claims filed motions to dismiss for defective service of process, failure properly to allege tribal court jurisdiction, and lack of tribal court jurisdiction over the subject matter of the suit. In February 1984, the tribal court dismissed

the LaPlantes' complaint against the two companies without prejudice, concluding that the complaint had failed to allege the factual basis for tribal court jurisdiction and that service of process had been insufficient. Because these defects could be so easily cured, the tribal court also addressed the companies' argument that jurisdiction over the dispute was lacking because the companies are non-Indians (J.A. 35-39).

The tribal court ruled that the Blackfeet Tribe retained sufficient sovereignty over the reservation to regulate non-Indians when engaged in consensual commercial relations with Indians on the reservation (J.A. 36-37). By entering into an insurance contract with Blackfeet Indians (the Wellmans) covering a business located on the reservation (the Wellman Ranch), Iowa Mutual undertook to insure the Wellmans against exactly the kind of claim asserted by the LaPlantes (*id.* at 38). Moreover, the Tribe had a strong interest in Iowa Mutual's fulfillment of its contractual obligations because the health and welfare of tribal members were directly affected (*id.* at 39). Because the tribal court jurisdiction was co-extensive with the legislative jurisdiction of the Tribe (*id.* at 41), the tribal court had jurisdiction over this suit.

In March 1984 the LaPlantes filed an amended complaint that properly alleged that the Wellmans and the LaPlantes are Blackfeet tribal members and that the accident occurred on the reservation. Service was obtained on Iowa Mutual and Midland Claims in accordance with the Blackfeet Tribal Code. The pleading defects thus having been cured, Iowa Mutual and Midland Claims renewed their motion to dismiss for lack of subject matter jurisdiction. The tribal court denied the motion by summary order

in October 1984. A tribal court of appeals exists, but no appeal can be taken from the interlocutory jurisdictional ruling until after final judgment. The tribal court has not yet ruled on the merits of the dispute over the coverage of the Iowa Mutual insurance policies.

2. In May 1984, after the LaPlantes filed their amended complaint in tribal court, Iowa Mutual brought suit against the LaPlantes, the Wellmans, and the Wellman Ranch in the United States District Court for the District of Montana. Iowa Mutual sought a declaratory judgment that the LaPlantes' claims were not covered by the insurance policies it had issued to the Wellmans and that Iowa Mutual had no duty to indemnify or defend the Wellmans or the Wellman Ranch. Because Iowa Mutual is an Iowa corporation whose principal place of business is in Iowa, while all the named defendants are Montana citizens, Iowa Mutual alleged jurisdiction based on diversity of citizenship. 28 U.S.C. 1332.

In September 1984, the federal district court dismissed the case (Pet. App. 1a-2a). The court concluded that, under *R.J. Williams Co.* v. *Fort Belknap Housing Authority*, 719 F.2d 979 (9th Cir. 1983), cert. denied, No. 83-1811 (June 17, 1985), it must refrain from entertaining the suit in diversity until the tribal court has been "afforded the opportunity to determine its jurisdiction" (*id.* at 2a). Only if the tribal court "decides not to exercise its exclusive jurisdiction" (*ibid.*) could the federal suit go forward. The district court issued this ruling after the tribal court had asserted jurisdiction over the suit in its February 1984 ruling but before it had denied Iowa Mutual's second dismissal motion in October.

The court of appeals affirmed (Pet. App. 3a-6a). The Ninth Circuit followed its holding in *R.J. Williams Co.* v. *Fort Belknap Housing Authority, supra*, that state court jurisdiction, and thus federal court diversity jurisdiction, may exist over a dispute arising on an Indian reservation only if the tribal court has decided not to exercise jurisdiction. 719 F.2d at 983-984. The court of appeals (Pet. App. 5a) found *R.J. Williams Co.* in accord with *National Farmers Union Insurance Cos.* v. *Crow Tribe of Indians*, No. 84-320 (June 3, 1985), in which this Court held that the lawful limits of tribal court jurisdiction over non-Indians presented a federal question under 28 U.S.C. 1331 but that a federal court should await an initial determination by the tribal court of its own jurisdiction. Thus, the court of appeals declined to reconsider *R.J. Williams Co.* and held that the district court correctly dismissed the case (Pet. App. 4a-6a).[1]

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[1] After commencement of the LaPlantes' suit in tribal court, Midland Claims brought suit in federal district court against the LaPlantes, the Blackfeet Tribal Court, and the Blackfeet Tribe. Midland Claims sought a declaratory judgment that the tribal court lacked jurisdiction over the LaPlantes' bad faith claims against Midland Claims and Iowa Mutual and an injunction barring further tribal court proceedings. Iowa Mutual intervened as a plaintiff. The jurisdictional basis alleged was 28 U.S.C. 1331.

The district court dismissed the case for failure to state a claim. Midland Claims and Iowa Mutual appealed. While the appeal was pending, this Court rendered its decision in *National Farmers Union*, and the Ninth Circuit remanded the case to the district court for redetermination in light of *National Farmers Union*.

The district court on remand dismissed the action without prejudice so that Midland Claims and Iowa Mutual could first exhaust the remedies available under Blackfeet tribal law

Iowa Mutual subsequently filed a petition for a writ of certiorari. The petition alleged, among other things, that the Ninth Circuit ruling conflicted with the Eighth Circuit's decision in *Poitra* v. *Demarrias*, 502 F.2d 23 (1974), cert. denied, 421 U.S. 934 (1975). The Court granted the petition on May 27, 1986.[2]

SUMMARY OF ARGUMENT

The court of appeals and district court correctly required dismissal of the suit. The courts below followed the clear federal policy of promoting Indian tribal self-government by avoiding impairment of tribal court jurisdiction. That policy, as this Court held in *National Farmers Union Insurance Cos.* v.

(Br. in Opp. App. 1a-5a). The court recognized that the tribal trial court had already determined that it had jurisdiction over the subject matter and the parties (*id.* at 3a). Nonetheless, the district court held that the federal policy of promoting tribal self-government required exhaustion of tribal court remedies and that such exhaustion would not occur here until the tribal court of appeals had ruled on the jurisdictional issue (*ibid.*).

[2] The Ninth Circuit in this case and in *R.J. Williams Co.* had followed its similar holdings in *Hot Oil Service, Inc.* v. *Hall*, 366 F.2d 295 (1966), and *Littell* v. *Nakai*, 344 F.2d 486 (1965), cert. denied, 382 U.S. 986 (1966). By contrast, the district courts in *American Indian Agricultural Credit Consortium, Inc.* v. *Fredericks*, 551 F. Supp. 1020 (D. Colo. 1982), and *American Indian National Bank* v. *Red Owl*, 478 F. Supp. 302 (D.S.D. 1979), followed *Poitra* and entertained a diversity suit. More recently, the Eighth Circuit in *Weeks Construction, Inc.* v. *Oglala Sioux Housing Authority*, 797 F.2d 668 (1986), has substantially narrowed, and possibly undermined the reasoning of, the earlier ruling in *Poitra*.

Crow Tribe of Indians, No. 84-320 (June 3, 1985), requires not only that state and federal courts decline to hear a matter properly within the jurisdiction of a tribal court but also that the tribal court system be given the first opportunity to determine the limits of its own jurisdiction. Iowa Mutual's federal suit, which concerns precisely the same events and raises precisely the same issues as the case pending in the Blackfeet tribal court system, was properly dismissed because the tribal courts have not finally determined their own jurisdiction in the matter.

Nothing further is actually at issue at this stage of the litigation. We note, however, that *National Farmers Union* makes clear that, once the tribal court has had a full opportunity to determine its own jurisdiction by Iowa Mutual's exhaustion of appellate remedies in the tribal court system, federal court review of the tribal court's jurisdiction will be available. We submit, moreover, that it is equally clear that, if the tribal court is determined to lack jurisdiction, diversity jurisdiction over the dispute plainly exists—the dispute is between an Iowa citizen and Montana citizens and more than $10,000 is at issue—and that nothing in the doctrine that takes its name from *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), would bar the federal court from reaching the merits of the dispute. It is unnecessary for this Court now to decide whether principles of federal law might otherwise bar the suit and what rules of preclusion would apply when the federal court considers the tribal court's jurisdiction after the tribal court has already ruled on that issue.

ARGUMENT

I. THIS SUIT WAS PROPERLY DISMISSED IN DEFERENCE TO TRIBAL COURT JURISDICTION

A. It is by now firmly established that federal policy strongly promotes Indian tribal self-government. That policy is founded in the recognition that Indian tribes constitute political communities with substantial sovereign powers over their reservations. See, *e.g.*, *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 140, 146-148 (1982); *Montana* v. *United States*, 450 U.S. 544, 565-566 (1981). Indeed, although "Congress has plenary authority to legislate for the Indian tribes in all matters," *United States* v. *Wheeler*, 435 U.S. 313, 319 (1978), tribes retain those aspects of their inherent sovereignty not withdrawn by statute or treaty or by implication from their dependent status, *id.* at 323, 326. See *Felix S. Cohen's Handbook of Federal Indian Law* 231-232 (R. Strickland, ed. 1982). This recognition of presumptive tribal sovereignty serves as a backdrop for the interpretation of federal statutes and treaties. *Three Affiliated Tribes* v. *Wold Engineering* (*Three Tribes II*), No. 84-1973 (June 16, 1986), slip op. 7; *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 142-143 (1980).

Federal policy goes beyond acknowledging the sovereign powers of Indian tribes. In accord with that acknowledgment, the United States has a long-standing policy of affirmatively promoting tribal self-government. See *Three Tribes II*, slip op. 13; *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 334-335 & n. 17 (1983); *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 62 (1978). This policy is reflected in numerous federal statutes. See, *e.g.*, 25 U.S. 450, 450a (Indian Self-Determination and Education Assistance Act); 476-479 (Indian Reorganization Act, as amended, providing for tribal government); 1301-1311 (Indian Civil Rights Act, recognizing powers of self-government, establishing "bill of rights," and providing for development of model code of Indian offenses for Indian courts); 1321(a), 1322(a), 1326 (Indian tribal consent, through majority vote, required for state assumption of civil or criminal jurisdiction over Indian country); 1451 *et seq.* (Indian Financing Act of 1974, tribal economic development). Based on these and other enactments, this Court has repeatedly recognized the "well-established federal 'policy of furthering Indian self-government.'" *Santa Clara Pueblo* v. *Martinez*, 436 U.S. at 62, quoting *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974).

The authority to regulate conduct on the reservation is one fundamental aspect of tribal self-government protected by federal policy. Thus, federal law has long granted Indian tribes a broad immunity from state regulation. *McClanahan* v. *State Tax Comm'n*, 411 U.S. 164, 174-175 (1973); *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 152 (1973) (Indian tribes have "historic immunity from state and local control" of their reservations). Absent a governing Act of Congress, a state may not "infringe[] on the right of reservation Indians to make their own laws and be ruled by them." *Williams* v. *Lee*, 358 U.S. 217, 219-220 (1959).

Closely related to the power to exercise legislative jurisdiction, and of similar importance for tribal self-government, is the power to exercise adjudicatory jurisdiction over the reservation. Indeed, "the judicial powers of the tribe are coextensive with its legislative or executive powers." F. Cohen, *Handbook of Federal Indian Law* 145 (1942). As this

Court said in *United States* v. *Wheeler*, 435 U.S. at 332, "tribal courts are important mechanisms for protecting significant tribal interests" (footnote omitted).

Although tribal court criminal jurisdiction is subject to substantial federal limitations, see *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978), tribal court civil jurisdiction is not subject to similar statutory limits and, indeed, is "very broad" (R. Strickland, *supra*, at 342 (footnote omitted)). See *National Farmers Union*, slip op. 8-10. The importance of tribal court civil jurisdiction is indicated both by its scope and by its protection from state interference. Thus, the judicial power of tribes extends to disputes between tribal members, *Fisher* v. *District Court*, 424 U.S. 382, 387-388 (1976), but also includes the "inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations," *Montana* v. *United States*, 450 U.S. at 565. Tribal court civil jurisdiction, moreover, has long been protected from state impairment by a prohibition, which has been interpreted to be very broad, on state court jurisdiction in cases between Indians, *Fisher* v. *District Court*, 424 U.S. at 388, and in cases brought by non-Indians against Indians, *Williams* v. *Lee*, 358 U.S. at 223, wherever such state jurisdiction would not be "consistent with Indian tribal sovereignty and self-government." *Three Tribes II*, slip op. 9-10 [3] Federal statutory law supplements these longstanding limitations on state court juris-

[3] By contrast, "tribal autonomy and self-government are not impeded when a State allows an Indian to enter its court to seek relief against a non-Indian concerning a claim arising in Indian country." *Three Tribes II*, slip op. 11. See also *Williams* v. *Lee*, 358 U.S. at 219.

diction: since 1968, federal law has required tribal consent, obtained by majority vote of enrolled members, before any state, with certain specifically enumerated exceptions, may assume civil jurisdiction over disputes arising in Indian country to which an Indian is a party. 25 U.S.C. 1322(a) and 1326. See *Three Tribes II*, slip op. 7-10 (statutory method codified at 25 U.S.C. 1322 is exclusive method for states to assume civil jurisdiction after its enactment in 1953; tribal consent requirement added in 1968); *Kennerly* v. *District Court*, 400 U.S. 423 (1971).

The federal policy to foster and protect tribal civil jurisdiction rests on several basic premises. Most important, the exercise of jurisdiction by a nontribal forum over suits brought by non-Indians against Indians arising out of on-reservation activities would undermine the authority of the tribal court—that is, of one branch of the tribal government—over reservation affairs. *Williams* v. *Lee*, 358 U.S. at 223. It would also create the risk of conflicting adjudications. See *National Farmers Union*, slip op. 11; *Fisher* v. *District Court*, 424 U.S. at 388. In addition, even apart from its effect on the law-making authority of tribal courts themselves,[4] adjudication by a nontribal

[4] Of course, diversity jurisdiction might be thought to interfere with law-making authority of state courts. But the Constitution and federal statute—in providing for diversity jurisdiction (U.S. Const. art. III, sec. 2; 28 U.S.C. 1332), and even for removal to federal court, where diversity exists, of many actions initially filed in state court (28 U.S.C. 1441(a) and (b))—have specifically addressed the potential for interference and determined that such concerns are outweighed by the competing interests in a litigant's avoidance of local court bias. With respect to Indian tribal courts, there is neither a removal statute nor any other constitutional or statutory provision overriding the interest in avoiding impairment of tribal

forum might impair tribal law-making authority, because tribal courts may be better qualified than non-Indian courts to interpret the often distinctive norms and practices of an Indian tribe.

As noted, the policy promoting tribal self-government and self-determination divests state courts, as a matter of federal law, of the authority to exercise jurisdiction that might impair tribal court civil jurisdiction. Correspondingly, it also places limits, as a matter of federal common law, on the authority of federal courts to exercise such intrusive jurisdiction. Thus, this Court held in *National Farmers Union* that the federal policy promoting tribal self-government requires a federal court to refrain from determining the legality of the tribal court's exercise of jurisdiction over non-Indians—a federal question ultimately reviewable in federal court—until the tribal court itself has had "a full opportunity to determine its own jurisdiction." Slip op. 11.

The rationale supporting the holdings in *National Farmers Union*, *Williams* v. *Lee*, and *Fisher* v. *District Court* similarly precludes the exercise of jurisdiction in a diversity case like Iowa Mutual's suit. *National Farmers Union* itself shows that the principle extends to federal as well as state courts. And the impairment of tribal court jurisdiction is just as serious when the federal court adjudicates the merits of an on-reservation contract or tort dispute as when it adjudicates the federal question of the tribal court's jurisdiction, for it is the provision of a forum in competition with the tribal court that

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self-government. Certainly, the diversity statute does not override the Indian self-government policy, since a tribal court is no more foreign to a non-Indian litigant who resides outside the state of the Indian litigant than to a non-Indian litigant who resides in the state.

works the impairment. See *Santa Clara Pueblo* v. *Martinez*, 436 U.S. at 59 ("providing a federal forum for issues arising under [the Indian Civil Rights Act] constitutes an interference with tribal autonomy and self-government beyond that created by the change in substantive law itself").

The federal tribal self-government policy thus bars Iowa Mutual's avowed attempt to have its liability under its insurance policies (arguably an on-reservation dispute) adjudicated in a forum other than tribal court, where the claimants brought suit. This principle is surely no less applicable where, as here, the tribal trial court has already made an initial determination that it has jurisdiction over the insurance coverage dispute. As *National Farmers Union* indicates, a proper respect for tribal courts requires "[e]xhaustion of tribal court remedies"—requires that the tribal courts be given a "full opportunity" to consider the issues and "to rectify any errors" they may make. Slip op. 11. The federal policy promoting Indian self-government fully comprehends the development of tribal appellate courts as well as tribal trial courts. There is no reason to suppose that appellate courts are less important in an Indian judicial system than they are in the state and federal systems.

The remedies in the Blackfeet Tribal Court system include appellate review, and Iowa Mutual has not yet obtained such review. Blackfeet Tribal Code, ch. 1, sec. 5. Until such appellate review is complete, the tribal courts will not have had a full "opportunity to evaluate the factual and legal bases for the challenge" and to "rectify any errors [they] may have made" (*National Farmers Union*, slip op. 10-11 (footnote omitted)). A final appellate ruling on the jurisdictional issue and on the merits will most

effectively provide an explanation to the parties of "the precise basis for accepting jurisdiction" and give to other courts "the benefit of [the tribal court's] expertise in such matters in the event of further judicial review" (*id.* at 11 (footnote omitted)). Until the Blackfeet Tribal Court system has issued a final judgment in the case, federal court adjudication of either the jurisdictional issue or the merits would undermine the clear federal policy promoting the development of tribal courts.

B. Contrary to Iowa Mutual's suggestion, entertainment of the suit in federal court is not warranted by virtue of Iowa Mutual's "very real concern about the competence of the Tribal Court and * * * a very real fear of local prejudice" (Pet. Br. 14).[5] First, such prospective allegations of bias and incompetence are not among the specifically enumerated exceptions to the exhaustion requirement recognized in *National Farmers Union*.[6] Unless this exhaustion requirement is to be eviscerated, such allegations must be made initially in the tribal court system. See *A & A Con-*

[5] Iowa Mutual asserts that the judges of the Blackfeet Tribal Court "serve at the pleasure of the Tribal Council" (Pet. Br. 14). In fact, the Blackfeet Tribal Code requires that removal of judges be for "cause" and only after notice and a hearing (Pet. App. 9a). Iowa Mutual also observes that the only qualifications for tribal court judges are that they be Blackfeet Tribe members, be more than 21 years old, and not be convicted felons (Pet. Br. 14). The Tribal Code states, in addition, that the judge should "preferably be a commercial law student at the time of the original appointment" (Pet. App. 9a).

[6] See slip op. 10, n.21 (exhaustion may not be required where assertion of tribal jurisdiction is motivated by desire to harass or conducted in bad faith or is "patently violative of express jurisdictional prohibitions" or where there is no adequate opportunity to challenge the tribal court's jurisdiction).

crete, Inc. v. *White Mountain Apache Tribe*, 781 F.2d 1411, 1416-1417 (9th Cir.), cert. denied, No. 85-1598 (May 19, 1986); *White* v. *Pueblo of San Juan*, 728 F.2d 1307, 1313 (10th Cir. 1984). Second, the Indian Civil Rights Act, 25 U.S.C. 1302, furnishes non-Indians appearing before tribal courts strong protections against unfair treatment: such litigants are guaranteed compulsory process, the right to retain counsel and to confront witnesses, equal protection, and due process of law, among other rights. Third, and of decisive importance, this Court, relying on the clear congressional policy promoting the development of tribal court civil jurisdiction, has squarely rejected the kind of broad attack on tribal courts that Iowa Mutual makes here: "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. at 65 (footnote omitted). See also *National Farmers Union*; *Fisher* v. *District Court*, *supra*; *Williams* v. *Lee*, *supra*.[7]

Nor, contrary to Iowa Mutual's suggestion, does the statutory grant of diversity jurisdiction override the federal policy requiring deference to tribal court civil jurisdiction. As we have noted, tribal self-determination and the authority of the tribal courts would seriously be undermined if either federal courts exercising diversity jurisdiction or state courts were free to resolve disputes within the tribal court's jurisdiction. Moreover, there is no indication whatever that Congress has, by establishing diversity ju-

[7] The tribal court's memorandum and order in this case (J.A. 33-44) is itself a powerful answer to Iowa Mutual's charges of incompetence.

risdiction, intended to impair the tribal court civil jurisdiction that it and this Court have so carefully fostered for many years.

The diversity statute itself makes no reference to Indians. 28 U.S.C. 1332. And nothing in the legislative history suggests any intent to override the tribal self-government policy. Section 11 of the Judiciary Act of Sept. 24, 1789, 1 Stat. 78-79,[8] by which Congress first created diversity jurisdiction, was clearly not intended to limit or abrogate tribal sovereignty and the tribal powers of self-government. Except for the Five Civilized Tribes, whose institutions were soon severely curtailed, judicial tribunals in the Anglo-American sense were largely unknown in the traditional Indian world of the eighteenth century.[9] Moreover, until the late nineteenth century most Indians were not considered citizens of the states in which their reservation was located or of a foreign state, *Elk* v. *Wilkins*, 112 U.S. 94, 102-104, 108-109 (1884); *Worcester* v. *Georgia*, 31 U.S. 515, 559 (1832), so a suit brought against an Indian would not meet the statutory requirement of diversity jurisdiction. *Paul* v. *Chilsoquie*, 70 F. 401, 402 (C.C.D. Ind. 1895); *Cherokee Nation* v. *Georgia*, 30 U.S. 1,

[8] Section 11 of the Judiciary Act (1 Stat. 78-79) provided:

> That the circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State.

[9] In 1883 the Bureau of Indian Affairs introduced Courts of Indian Offenses on Indian reservations. See R. Strickland, *supra*, at 333-334.

15-18 (1831) (Indian tribes are not foreign states, and individual Indian tribal members are not aliens). Diversity jurisdiction has often been revisited by Congress, most recently in 1976,[10] and the various amendments it has adopted are uniformly silent regarding any intention to limit or abrogate tribal court jurisdiction over non-Indians engaging in activities on the reservation.

Just as nothing in the history of the diversity statute suggests a limitation on tribal self-government, the policies underlying diversity jurisdiction do not support such a limitation. Iowa Mutual is surely correct that diversity jurisdiction seeks to free litigants from local forum bias, but it cannot plausibly be thought that Congress, in providing for diversity jurisdiction, intended to address non-Indian litigants' concerns about suspected tribal-court bias. There is no evidence of such an intent, and such an intent would run squarely counter to the congressional promotion of tribal courts. Moreover, even though Indians are citizens of the states in which they are domiciled,[11] diversity jurisdiction would be a very

[10] Act of Oct. 21, 1976, Pub. L. No. 94-583, § 3, 90 Stat. 2891; Act of Aug. 14, 1964, Pub. L. No. 88-439, 78 Stat. 445; Act of July 25, 1958, Pub. L. No. 85-554, § 2, 72 Stat. 415; Act of July 26, 1956, ch. 740, 70 Stat. 658; Act of June 25, 1948, ch. 646, § 1332, 62 Stat. 930; Act of Apr. 20, 1940, ch. 117, 54 Stat. 143; Act of Aug. 21, 1937, ch. 726, 50 Stat. 738; Act of May 14, 1934, ch. 283, 48 Stat. 775; Act of Mar. 3, 1911, ch. 231, § 24, 36 Stat. 1091; Act of Aug. 13, 1888, ch. 866, 25 Stat. 433; Act of Mar. 3, 1887, ch. 373, 24 Stat. 552; Act of Mar. 3, 1875, ch. 137, 18 Stat. 470; Rev. Stat. §§ 563, 629 (1875 ed.).

[11] The Act of June 2, 1924, ch. 233, 43 Stat. 253, provided that Indians born in the United States are United States citizens. This Act has been superseded by the current version, codified at 8 U.S.C. 1401. Indians, as citizens of the United States,

poor vehicle to provide non-Indians with a federal court alternative to tribal court. Under 28 U.S.C. 1332, diversity jurisdiction would be available only to non-Indians who happen to be citizens of a state different from that of the Indian litigant. To the extent there is a problem of bias in tribal courts, non-Indian litigants who are residents of the Indian litigants' state would surely have the same complaint; yet the diversity statute would address such litigants' complaint not at all.

In urging that its diversity suit should be entertained, Iowa Mutual argues (Pet. Br. 5-13) that diversity of citizenship plainly exists in the case and that Congress has created no exception to diversity jurisdiction for reservation Indians. This contention turns the well-established law governing tribal court civil jurisdiction on its head. Indian tribes do not require an affirmative grant of authority from Congress in order to exercise civil jurisdiction; rather, they possess a broad measure of civil jurisdiction over activities of non-Indians on Indian reservation lands as part of their inherent sovereignty. *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-153 (1980). Consequently, tribal civil jurisdiction over reservation activities exists unless limited by specific treaty provisions, by express federal legislation, or by implica-

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are also citizens of the state in which they are domiciled. *Goodluck* v. *Apache County*, 417 F. Supp. 13, 15 (D. Ariz. 1975), aff'd, 429 U.S. 876 (1976). This conclusion also finds support in the first sentence of the Fourteenth Amendment to the United States Constitution: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

tion from the tribe's dependent status. *National Farmers Union*, slip op. 10; *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982); *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978). Moreover, "[r]epeal by implication of an established tradition of * * * self-governance is disfavored." *Rice* v. *Rehner*, 463 U.S. 713, 720 (1983). See also *Santa Clara Pueblo* v. *Martinez*, 436 U.S. at 60 ("a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent"). There is no indication of congressional intent to override the Indian self-government policy when diversity of citizenship happens to exist. "Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence * * * is that the sovereign power * * * remains intact." *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. at 149 n.11.

II. IN THE ABSENCE OF TRIBAL COURT JURISDICTION, THE LIMITS OF WHICH PRESENT A FEDERAL QUESTION, THE FEDERAL COURTS POSSESS DIVERSITY JURISDICTION OVER THIS SUIT AND *ERIE* WOULD NOT REQUIRE DISMISSAL

Because deference to tribal courts' civil jurisdiction requires dismissal of Iowa Mutual's diversity suit,[12] the judgment of the court below should be

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[12] The court of appeals directed that the diversity action be dismissed. If there are any statute of limitations problems, it would ordinarily be more appropriate for the district court to take jurisdiction but stay all proceedings pending the tribal court system's determination of tribal court jurisdiction. Cf. *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213,

affirmed. We believe it appropriate, however, briefly to address several additional issues raised in the decision below, in other lower court decisions on this subject (see note 2, *supra*), and in the parties' briefs.

First of all, it is clear that Iowa Mutual can seek federal court review of the tribal court's jurisdiction once it has exhausted its tribal court remedies. *National Farmers Union* held that the limits of tribal jurisdiction over non-Indians present a federal question within the federal courts' jurisdiction under 28 U.S.C. 1331. Slip op. 7-10. It is likewise clear that, if the Blackfeet Tribal Court properly has jurisdiction, the federal court cannot impair that jurisdiction by relitigating the dispute between Iowa Mutual and its adversaries presented to the Blackfeet courts. Any such relitigation would directly undermine the federal policy requiring respect for tribal courts.

If, however, the tribal court lacks jurisdiction, the question remains whether the federal court may properly entertain the suit on the merits. Although we believe the court of appeals correctly affirmed the district court's dismissal of the action, we think that the court erred in two respects relevant to this remaining question. The first error may be considered technical, at least in this case: dismissal should not have been for lack of subject matter jurisdiction but for failure to state a claim. The second is more important and certainly not technical: the *Erie* doctrine does not bar entertainment of the suit.

A. It seems to us that the initial question of the district court's jurisdiction in this case is easily an-

222-223 (1966). Petitioner Iowa Mutual, however, made no such alternative request in the courts below, and has not asked for such relief in this Court.

swered by the diversity statute itself. Section 1332 (a) of title 28 of the United States Code states:

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—(1) citizens of different States * * *.

This dispute plainly meets these straightforward requirements. Thus, the plaintiff is an Iowa citizen, since it is incorporated in Iowa and has its principal place of business there. 28 U.S.C. 1332(c). The defendants are all citizens of Montana, since they are all domiciled in Montana and Indians are citizens of the United States and of the states in which they are domiciled. See note 11, *supra*. And the dispute exceeds $10,000 in value (J.A. 2).

Since all of the statutory requirements are met, we submit that the proper conclusion is that diversity jurisdiction exists over this lawsuit. See *Begay* v. *Kerr-McGee Corp.*, 682 F.2d 1311, 1315 (9th Cir. 1982). It seems to us more in keeping with its common-law nature and origin to view the federal policy promoting Indian self-government, not as jurisdictional, but as a rule of decision, which, once jurisdiction in diversity exists, requires dismissal on the merits or a stay pending completion of the tribal court proceedings. Indeed, the option of staying rather than dismissing proceedings would seem incompatible with the treatment of the policy as jurisdictional. In this regard, we view the policy as closely analogous to the abstention doctrine, which this Court has not treated as affecting the federal court's jurisdiction. See *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976).

We note, however, that as far as this case is concerned, this conclusion is more a matter of analytical characterization than of substance.[13] Both courts below considered whether the federal policy promoting tribal self-government precludes the federal court from proceeding past the filing of the lawsuit to consider the rights of the parties under the insurance policies. In this case it matters little whether the courts' affirmative answer to the question is characterized as depriving the court of jurisdiction or of power to grant the relief requested. In either case the courts rightly concluded that "entertainment" of the suit is improper while the tribal court is adjudicating the dispute.

B. The court of appeals required dismissal not only because of the federal policy respecting tribal courts but also because of the *Erie* doctrine. Thus, the court followed *R.J. Williams Co.*, which indicated that, even if there is no tribal jurisdiction, federal diversity jurisdiction would be barred as long as the state in which the federal court sits would not exercise jurisdiction over the non-Indian's suit. In short, *R.J. Williams Co.* held, based on its reading of *Woods* v. *Interstate Realty Co.*, 337 U.S. 535 (1949), that federal diversity jurisdiction is wholly derivative of state jurisdiction. Where, as here, Montana has not assumed civil jurisdiction over the Blackfeet Indian Reservation, the federal district court in Montana must dismiss a diversity suit.

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[13] Of course, in some situations the characterization of a rule as "jurisdictional" or going to the merits may have important consequences, *e.g.*, waiver of rights under the rule or preclusion in future cases. See, *e.g.*, *Mitchell* v. *Maurer*, 293 U.S. 237, 241-242 (1934); Restatement (Second) of Judgments § 12, at 115 (1982).

We submit that this analysis is erroneous. *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), concerns the rules of law that a federal court must apply in a diversity case. As the Ninth Circuit itself noted in *Begay* v. *Kerr-McGee Corp.*, 682 F.2d at 1316-1317, the question of choice of law under *Erie* arises only after the requirements of diversity jurisdiction have already been met. Moreover, *Erie* generally requires, in accordance with the Rules of Decision Act, 28 U.S.C. 1652, that state law be applied to most, but not all, of the issues that arise in the lawsuit. As this Court held in *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, 536-537 (1958), state law is not to be applied when it is not "intended to be bound up with the definition of the rights and obligations of the parties," at least as long as there are "affirmative countervailing considerations" based on federal policy.

Accordingly, the unavailabilty of the Montana state courts as a forum for non-Indian suits against Indians like Iowa Mutual's suit does not deprive the federal court of the power to entertain the suit. The mere absence of jurisdiction in the state court, standing alone, does not furnish a state law to be applied to bar the suit. Diversity jurisdiction is created by federal statute and Article III of the Constitution, and is not merely derivative of state court jurisdiction. Where, as here, the absence of state court jurisdiction results only from the federal statute requiring tribal consent, and not from any independent state judgment concerning the rights and obligations of non-Indians and Indians,[14] there is no state law to be applied under *Erie*.

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[14] We assume, *arguendo*, that it is solely federal law (25 U.S.C. 1322, 1326), that accounts for the absence of state

Contrary to the Ninth Circuit's reasoning, this Court's decision in *Woods* is entirely in accord with this analysis. There may have been room to debate which was the correct side of the line separating "substantive" from "procedural" state laws for the state "door-closing" statute there at issue. But the statute in *Woods* obviously reflected an affirmative state policy and hence was properly subject to analysis under the *Erie* doctrine. As the Eighth Circuit rightly concluded in *Poitra* v. *Demarrias*, *supra*, it is this threshold requirement for *Erie*'s application that the federally imposed absence of state court jurisdiction over Indian country fails to meet.[15]

There is, however, a possible impediment to the exercise of either state court or diversity jurisdiction in this Court's decision in *Williams* v. *Lee*, *supra*, which held that a state court should dismiss a claim by a non-Indian against an Indian, regarding on-reservation activities, that could be asserted and ad-

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court jurisdiction in Montana in cases like this one. Indeed, under Montana law, the Governor has power to proclaim criminal or civil jurisdiction over tribal territory at the request of a tribe and with the relevant county's consent. Mont. Code Ann. § 2-1-302 (1985). Of course, if this litigation reaches the appropriate stage, it might be open for respondents here to argue that there is in fact an affirmative, substantive Montana policy barring suits like this from its courts and that, following the analysis in *Byrd*, there is no countervailing federal interest.

[15] In addition, there is an affirmative federal interest in providing a forum for the resolution of disputes where jurisdiction properly lies. Cf. *Three Tribes II*, slip op. 11 ("The federal interest in ensuring that all citizens have access to the courts is obviously a weighty one"). This interest must surely play a large role in the *Byrd* analysis, especially if no other forum exists.

judicated in tribal court. There is, in our view, no need for this Court to address in this case whether that principle would extend to the kind of declaratory relief sought here, which does not involve any ultimate claim for monetary or other relief against an Indian.

C. Two final issues deserve brief mention at this time, though not, we think, resolution. First, although state law, applicable through *Erie*, would not require dismissal of the diversity suit once the tribal court is determined not to have jurisdiction, it is a separate question, on which we offer no view, whether principles of federal law (including the just-mentioned *Williams* v. *Lee* principle) might suggest refusal to entertain the suit, if only to avoid discrimination between those non-Indians who can claim diversity and those who cannot. Second, it is also unclear whether, and to what extent, principles of preclusion should apply to the federal court's consideration of the tribal court's jurisdiction after the tribal court has ruled on its own jurisdiction—for example, to redetermination by the federal court of the tribal court's findings of "jurisdictional facts." Although 28 U.S.C. 1738 does not directly apply, preclusion principles have been developed as federal common law, see *University of Tennessee* v. *Elliott*, No. 85-588 (July 7, 1986), slip op. 5, and in some circumstances, tribal court judgments have been given preclusive effect, see *Santa Clara Pueblo* v. *Martinez*, 436 U.S. at 65, n.21. We note here only that strict preclusion might result in their being no federal forum for the resolution of a federal question, but we express no view at this time on what preclusion principles, if any, should apply in this context, and we believe it would be premature for this Court to address the question.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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